Supreme Court, U.S.
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No. 96-238

In The

Supreme Court of the United States

October Term, 1995

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the petitioner seriously misstate the opinion of the California Supreme Court and the issues before this Court. The questions presented by the petition are more properly stated as follows:

> Whether a claim that the imposition of a recreation fee constitutes a "taking without a payment of just compensation" under the Fifth Amendment presents a "final judgment" within the meaning of 28 USC § 1257, where the California Supreme Court has remanded the claim to the respondent public agency and the lower courts of the State to determine "what, if any, recreational fee the evidence might justify."

> Can the issue of whether an ordinance requiring a developer to commit one percent (1%) of the value of his proposed improvements to public art constitutes a "physical taking" under the Fifth Amendment, which was not pressed or passed upon in the lower courts, be raised for the first time in the petition?

> If the first question presented is answered in the affirmative, then may a public agency under *any* circumstances condition the grant of a discretionary upzoning of property on a requirement that a developer pay a fee as a partial mitigation of the impacts caused by the upzoning?

> If the second question presented is answered in the affirmative, then should this Court reverse its unanimous decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), and instead hold that regulation designed to preserve a community's aesthetics is a *per se* taking under the Fifth Amendment?

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BRIEF IN OPPOSITION

Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, in their official capacities as members of the city council (hereinafter "Culver City") respectfully request this Court deny the Petition of Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (hereinafter "Petitioner") for a writ of certiorari seeking review of the opinion of the California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).[1]

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1,[2] Culver City presents the following statement of the case to address the petitioner's omissions and to supplement the statement of the case presented by the petitioner.[3] Except for a

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[1] Pursuant to Supreme Court Rule 35.3, the petitioner should have substituted the current council members for those named herein. None of the individuals named herein are still members of the city council.

[2] Respondents' Brief in Opposition is timely pursuant to Supreme Court Rule 15.2. The petition was placed on this Honorable Court's docket on August 14, 1996.

[3] The petitioner goes to great lengths to persuade this Court with numerous inappropriate citations to (i) the first opinion of the Court of Appeal (Appendix G to the petition) which was voided by that court's grant of rehearing, (ii) the second opinion of the Court of Appeal (Appendix E to the petition) which was vacated by this Honorable Court [*Ehrlich v. City of Culver City*, 512 U.S. ___, 114 S. Ct. 2731 (1994)] and (iii)

the passing reference in footnote 1 on page 2 of his petition, petitioner has omitted any statement about the current procedural posture of the case below. Likewise, the petitioner has failed to explain that none of the myriad challenges brought to date and addressed by any court involving this matter has related to whether Culver City's art program would constitute a physical intrusion on the petitioner's property. Further, the petitioner failed to accurately describe Culver City's art program. In addition, the petitioner never made any attempt to seek modification of the type and extent of recreational uses permitted on the subject property. Finally, the petitioner failed to note that Culver City could not approve the petitioner's requested residential land-use approvals unless Culver City also approved an amendment to its General Plan.

A. Procedural Posture of This Case.

This matter is still pending in the trial court. The California Supreme Court has ordered this matter returned to Culver City for further proceedings.

> It is thus appropriate to return the case to the city to reconsider its valuation of the fee in light of the principles we have articulated. Remand to the city was apparently what occurred in *Dolan* itself after the case was returned to the Oregon Supreme Court. (*See, Dolan v. City of Tigard* []

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the third opinion of the Court of Appeal (Appendix C to the petition) which was voided when the California Supreme Court granted review. Cal. Rules of Court Rule 29.2(a).

877 P.2d 1201 [1994]) [the case is "remanded to the City of Tigard for further proceedings."]

Ehrlich v. City of Culver City, 12 Cal.4th 854, 885 (1996); Petition Appendix A, p. A44.

On August 15, 1996, pursuant to the trial court's order of August 6, 1996, Culver City filed a proposed alternative writ of mandate (the "Proposed Writ"). On August 22, 1996, the petitioner filed objections to the Proposed Writ. On August 29, 1996, Culver City filed responses to those objections. On September 26, 1996, the trial court has scheduled a continued hearing on petitioner's request for attorney's fees. Culver City anticipates that the trial court will likewise discuss the Proposed Writ at that time.

Once the matter is finally remanded to Culver City in accordance with the California Supreme Court's direction, as noted above, Culver City must then reconsider the appropriate amount of the mitigation fee. If upon remand the city council were to decide that the facts do not support any amount of mitigation fee, then no justiciable controversy would remain in this case. If upon remand, the city council were to impose some amount of a fee, then, upon the petitioner's challenge, that determination would first be reviewed by the trial court. Therefore, this Honorable Court should refrain from reviewing this matter until that remand is complete.

B. The Allegation of Physical Invasion of Private Property Has Been Raised for the First Time in the Petition.

For the first time in the seven years this case has been at issue, the petitioner has alleged that Culver City's art program should be considered a physical invasion or appropriation of real property. The petitioner's original pleadings in this matter alleged eleven causes of action, none of which included claims that a physical invasion had occurred. Likewise, in three prior appearances before the California Courts of Appeal, two prior appearances before the California Supreme Court and one prior appearance before this Honorable Court, the petitioner never argued that Culver City's art program constituted a physical taking of real property. Nor has any court ruled upon such issue.

C. The Art Program.

The California Supreme Court accurately described Culver City's art in public places program.

> By municipal ordinance, new residential development projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000, are required to provide "art work" (as defined by the ordinance) for the project in an amount equal to 1 percent of the total building valuation, or pay an equal amount in cash to the city art fund.

Ehrlich, supra, at p. 862; Petition Appendix p. A7. Under the ordinance, the art work placed on the site remains the

property of the developer. *See*, Culver City Municipal Code Section 33H-31(a); Petition Appendix N, p. N9. Based on the foregoing, if a developer chooses to comply with the art program by placing art work on the development site, that art work does not become a "public art project", any more than would a city-imposed specific design requirement for a certain style of architecture for a new building. Additionally, it is the developer's sole option to determine whether to place art work on the project site or pay an in lieu fee. To date, no court or dissenting justice has found any dispute with the original trial court's ruling upholding the art program.

D. The City Was Not Required to Approve the Townhome Project.

The California Supreme Court stated that:

> The record before us indicates that private recreational facilities were in scarce supply in the city and merited preservation and promotion. As the 1988 city staff analysis of [petitioner's] proposed project noted, "Culver City as a fully-developed urban city has very little open space in which to develop parks and related recreational facilities. By national standards . . . the City is deficient in park space, tennis courts, swimming facilities, gymnasiums and the recreational activity centers needed to maintain and enhance the 'quality of life' in our community."

Ehrlich, supra, at p. 882; Petition Appendix A, p. A39.

It is clear that some type of recreational use was needed and could be operated on the subject site.[4] In fact, it would have been a use similar to that which the petitioner had requested at the time he originally purchased the site. *Id.*, at pp. 860-861; Petition Appendix, pp. A3-A4. Therefore, the petitioner's investment-backed expectations would have been met and an economically viable use would have been permitted for the site, had Culver City denied petitioner's request to change the land use in order to build townhomes.

Notwithstanding the foregoing facts, the petitioner never requested permission to modify the existing land use restrictions to redevelop the site for more competitive recreational facilities. In fact, from 1974 through 1988, except for the subject townhome project, the petitioner requested permission to develop only one other use on the site. In 1981, petitioner requested permission to construct an office building. That request was presented to the Planning Commission. The Planning Commission recommended denial, and the petitioner abandoned that application. *Id.*, at p. 861; Petition Appendix A, p. A4.

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[4] The economic feasibility study prepared by the City "concluded that [petitioner's] club had encountered financial problems through a combination of management problems, poor maintenance, and a lack of competitive amenities offered by other clubs. Without extensive capital improvements, the study concluded the club could not 'compete financially in today's health and fitness market.' " *Ehrlich, supra,* at p. 861; Petition Appendix A, p. A5.

E. Culver City Was Required to Approve a General Plan Amendment before It Could Approve the Townhome Project.

One of the land use approvals requested by the petitioner in 1988 (which led to the approval of the townhomes) was a General Plan amendment. *Ehrlich, supra*, at p. 861; Petition Appendix A, p. A4. The General Plan land use designation for the subject property prior to Culver City's actions to approve the townhome project was commercial. Before it could approve the townhome project, Culver City had to approve a tentative and final tract map pursuant to the Cal. Subdivision Map Act; Cal. Government Code §§ 66410, *et seq.*, specifically, Section 66426. Pursuant to the Subdivision Map Act, Culver City could not approve the subject project unless it could make a finding the project was consistent with Culver City's General Plan. Cal. Government Code § 66474. In order to make such a finding, Culver City had to redesignate the petitioner's property from the General Plan land use designation of commercial to one permitting residential. Therefore, notwithstanding the petitioner's claims to the contrary (the petition at p. 6), the townhome project was not consistent with the existing General Plan.

REASONS FOR DENYING THE PETITION.

I.

THE CASE IS NOT PROPERLY BEFORE THIS HONORABLE COURT

A. The Entire Matter Regarding the Recreation Fee Is Still Pending in the Trial Court.

The California Supreme Court has remanded this matter to the lower courts with directions to remand the matter to Culver City for reconsideration. That reconsideration will include an application of the test required by the Just Compensation Clause of the Fifth Amendment as interpreted by this Honorable Court in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309 (1994) and the California Supreme Court in *Ehrlich, supra*. Until that reconsideration is completed and the highest California court has ruled on the appropriateness of any fee Culver City may impose, no final judgment will have been entered in this case and the federal question whether Culver City has taken private property without payment of just compensation, will remain unresolved. Without a final judgment, this Honorable Court has no jurisdiction to hear this matter. 28 USC § 1257.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), this Honorable Court reiterated that there are but a few exceptions which permit this Court to grant certiorari when a final judgment has not been rendered below. *Cox* discusses the four categories of exceptions.

The first category deals with those situations where the federal issue has been conclusively determined or that conclusion is preordained. *Cox, supra*, at 479. As

described previously, that factor is not found in the instant case. The California Supreme Court has directed Culver City to reevaluate the mitigation fee based upon the principles articulated by that court. *Ehrlich, supra,* at p. 885; Petition Appendix A, p. A44.

> Following remand, the city must determine whether and to what extent approval of plaintiff's requested land use changes justify the imposition of a recreation fee as a means of compensating it for the additional costs of attracting the development of comparable recreational facilities for its residents. The determination of such a fee will, of course, require the city to make specific findings supported by substantial evidence – that is, the city "must make some effort to quantify its findings" supporting any fee, beyond "conclusory statements," although "[no] precise mathematical calculation is required" . . . . (*Dolan, supra,* 512 at p. ___, 114 S.Ct. at p. 2322.)

Ehrlich, supra, at p. 885; Petition Appendix A, p. A44.

Based on the foregoing, it is clear that the first *Cox* exception to 28 USC § 1257 does not apply. The federal issue in this matter has not been conclusively determined nor is such conclusion preordained.

The second category of exceptions are those in which no matter what the outcome of the lower courts, the federal issues survive and require decision by this Court. *Cox, supra,* at p. 480. After remand to Culver City, one of three things will happen.

First, Culver City may determine that no fee could be supported, therefore, no fee would be imposed. If that

happens, then no further judicial determination as to whether a regulatory taking has occurred would be necessary and this matter would be moot.

Second, Culver City could impose a fee which the petitioner may accept. If that occurs, then there would be no justiciable controversy remaining and this matter would again be moot.

Finally, Culver City could impose a fee which the petitioner might resist. If that happens, then the matter would be returned to the trial court for a determination of whether the fee constitutes a taking of private property without payment of just compensation. Based on the foregoing, there are two possible outcomes after remand which will not require any review by this Honorable Court. Therefore, the second *Cox* exception does not apply.

The third category of exceptions are those cases where the federal claim has been finally decided but the further proceedings on the merits in the state courts will preclude review of the federal claim no matter what the outcome of the case. *Id.* at p. 481. As stated previously, the federal claim has not been finally decided. However, even assuming it had been, this exception still does not apply. As shown above, one of the possible outcomes in the matter below would permit the petitioner to retain his rights to seek this Honorable Court's review. Therefore, exception category number three does not apply.

Finally, the fourth category of exceptions relates to those cases where the federal issue has again been finally resolved but the further state court proceedings could be precluded by a different outcome on the federal issue. *Id.*

at p. 482. Here the only matter left to be resolved *is* the federal question. The petitioner's claims are based on the Just Compensation Clause of the Fifth Amendment. The California Supreme Court's remand directs Culver City to reconsider its imposition of the recreation fee based on principles required under the Fifth Amendment as it relates to claims of a regulatory taking. If the matter is returned to the trial court after Culver City's reconsideration, then that Fifth Amendment claim will likewise be reviewed and the petitioner will retain his rights to seek review from this Court after pursuing his case through the appellate system in California. Therefore, the fourth category of exception also is inapplicable.

Further support for the inapplicability of the four recognized exceptions to the jurisdictional requirement of 28 USC § 1257 can be found in the reasons for that requirement.

> The finality requirement of 28 USC § 1257 which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973). In the instant case, all three reasons for 28 USC § 1257 will be met by denial of the petition.

First, this Honorable Court is being requested to conduct a piecemeal review of the relevant issues. The petition asks for review of one-half of the issues involved in this case. This Court is being asked to review the state court's determination regarding the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) half of the *Nollan/ Dolan* test before the state courts have reached a final decision on the *Dolan* half of the test. This request is clearly a "piecemeal" approach.

Second, this Court is also being asked to give what could very well be an advisory decision. As stated earlier, two of the three possible outcomes which may occur after the remand of the matter to Culver City will result in "no real case or controversy". With both of those outcomes, no further judicial review of the subject issues will be required.

Finally, if this Court grants review at this time, then it would intrude on the pending state proceeding. As noted before, the California Supreme Court has directed the trial court to issue an order directing Culver City to review the amount of the fee. Upon that review, if Culver City imposes a fee, then the petitioner might continue his challenge. That challenge would first be brought in the trial court and then proceed through the state appellate system. Those state court proceedings should be permitted to continue to final judgment without intrusion from the federal bench at this time.

In addition to the foregoing policy reasons, this Court should deny the petition in order to give full effect to its previous order in this matter. For the petitioner to prevail on his argument that this matter has reached a

final judgment in the courts below, the two-prong test established by *Nollan* and *Dolan* would be meaningless. The petitioner's argument would mean that no federal issue remains in dispute in this matter because the California Supreme Court has reached a conclusion about only the first prong of the *Nollan/Dolan* test. Petitioner's argument, in fact, even makes this Court's remand of the instant case "for further reconsideration in light of *Dolan* []" ineffectual. *Ehrlich v. City of Culver City*, 512 U.S. ___, 114 S.Ct. 2731 (1994). Clearly, this Court required the lower courts to reconsider both prongs of the test applicable to this type of regulatory taking claim.

Upon that reconsideration, the California Supreme Court has determined that the "essential nexus" prong of the *Nollan/Dolan* test has been met. Additionally, based on the facts it had before it, that court determined that Culver City had not met the "rough proportionality" prong of *Nollan/Dolan*. On that latter issue, the matter will be returned to Culver City for further proceedings, similar to what happened in *Dolan* itself after the case was returned to the Oregon Supreme Court. *See, Dolan v. City of Tigard*, 319 Or. 567 (1994).

Given that the second prong of the *Nollan/Dolan* test is not yet final either administratively or in the State's courts, accepting the petition would constitute a gross federal interference by this Court with ongoing state administrative and judicial functions. As the Chief Justice has written, the "final judgment" requirement serves an important role in preserving harmonious State-federal relations.

> I consider § 1257 finality to be but one of a number of congressional provisions reflecting concern that uncontrolled federal judicial interference with state administrative and judicial functions would have untoward consequences for our federal system. [Footnote omitted.]

Cox, supra, at p. 503 (Rehnquist, J., dissenting.)

The final judgment requirement has been a cornerstone of this Court's jurisprudence since 1789. As Justice Frankfurter has stated: "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

Moreover, even in *Cox,* the Court explicitly recognized that in cases involving the Fifth Amendment's takings clause, such as the case at bar, there is often an initial interlocutory decision involving a federal question with another federal question to be decided later by the state courts. But this Court held in *Cox* that:

> A state judgment is not final unless it covers both aspects of that integral problem. [Citations omitted.]

Cox, supra, at 479 n. 6.

In the case at bar, the petitioner has not yet received a final state judgment on the second aspect of the integral Fifth Amendment problem, *i.e.,* the amount of fee that may be constitutionally imposed on his development. As is discussed above, under several logical scenarios that issue may never become a "case or controversy." This is not the case to warrant further expansion of the "final

judgment" requirement and a reversal of long-standing authorities.

Based on all of the foregoing, at this time this Honorable Court does not have jurisdiction to hear this matter. A substantial federal issue remains to be decided and a "[f]inal judgment or decree [has not been] rendered by the highest court of a State in which a decision could be had . . . ." 28 USC § 1257 (a). That federal issue – whether the imposition of a fee meets Fifth Amendment protections against regulatory takings without just compensation – is the linchpin to the petitioner's entire claim in this matter. Therefore, this Honorable Court is respectfully requested to deny the petition.

B. Until This Petition, Allegations Regarding the Art Program Were Never Raised.

The petitioner has never, in all the years this matter has been winding its way up and down various levels of state and federal courts, alleged that Culver City's art program constituted a physical invasion of private property. Perhaps that is because it is clear that the art program does not constitute a physical invasion of property.[5]

The petitioner's complaint in the trial court only alleged that the art program unconstitutionally imposed a

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[5] In fact, during one of the appearances at the California Courts of Appeal, the petitioner's counsel indicated that had it not been for the recreation fee, the petitioner would not have challenged the art program. It seems untenable that the petitioner would have waived his arguments regarding the art program, if indeed it was an actual physical intrusion on his property.

fee. No allegations were made regarding the placement of art on the petitioner's property. This Honorable Court should not permit the petitioner, at this late date, to allege the art program somehow constitutes a physical invasion of private property.

In *Illinois v. Gates*, 462 U.S. 213 (1983), Chief Justice Rehnquist reiterated the importance of the rule against deciding claims "not pressed nor passed upon" in state court.

> [D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

Id., at p. 219.[6]

Here there is no doubt that the petitioner's original complaint did not raise the claim that a physical taking

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[6] In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court reiterated the *Illinois* rule before finding an exception to that rule because there were ambiguities in the complaint and lower court decisions as to whether the issue of both physical takings and regulatory takings had been raised. Notwithstanding the exception, this Honorable Court ultimately decided that the issue of regulatory taking had not been properly raised in the Yees' petition and, therefore, refused to hear that argument. In doing so, Justice O'Conner's opinion stated that: "While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question." *Id.* at p. 537. Because of the importance of the physical taking question, the petitioner should have raised it below. If permitted to raise it now for the first time, then this Court would be permitting a party to circumvent having fundamental issues addressed in the lower courts.

had occurred. The petitioner only claimed that the fee imposed under the art program did not meet constitutional standards. There is also no doubt that no court has ruled on whether the art program could constitute a physical invasion. This may be because the petitioner had originally decided to pay the in lieu fee. However, even after changing his mind and placing art work on the townhome site, while still in the California Supreme and appellate courts and even before this Honorable Court in *Ehrlich v. Culver City*, 512 U.S. ___, 114 S.Ct. 273 (1994), the petitioner never raised the issue of a *per se* physical taking.

Actually, if a physical taking had been at issue then this Court's previous remand would have made no sense. That remand required the California Court of Appeal to reconsider its decision in light of this Court's decision in *Dolan*. As this Court is well aware, *Dolan* is not a *per se* takings case. Further, no reconsideration would have been needed if a *per se* taking had occurred.

In order to preserve the important policy reason, which gives rise to the "not pressed or passed upon" rule and which was reiterated by Chief Justice Rehnquist in *Illinois v. Gates, supra*, this Court is respectfully requested to deny the petition.

II.

MITIGATION OF THE IMPACTS FROM A LAND USE CHANGE IS A CONSTITUTIONAL EXERCISE OF A CITY'S POLICE POWER

The petitioner attempts to overturn 70 years of precedent with his argument that Culver City cannot mitigate the impacts resulting from a change of zoning. In *Dolan*, this Court noted the long line of cases [starting with the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)] which provide great deference to governmental land use regulations which do not entail physical intrusions into private property.

> A land use regulation does not effect a taking if it "substantially advances(s) legitimate state interests" and does not "den(y) an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). [Modifications original.]

Dolan, supra, at ___, 114 S. Ct. at p. 2316.

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

Culver City has clear authority to plan its community for various uses, including recreational facilities which the city council has determined are necessary for the

public health and welfare. This is a fundamental authority every city has under its police power. *Village of Euclid, supra; Keystone Coal Association v. DeBenedictis,* 480 U.S. 470 (1987); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Based on the foregoing long-recognized authority, the City can regulate the use of land within its jurisdiction in such a way as to provide the community with the *opportunity* for the placement of housing in certain areas, commercial and industrial uses in other areas and recreational facilities on the subject site.

This is true even if, as in this case, the property owner no longer wants to provide the recreational use provided by Culver City's land use approvals. This authority is no different from the Culver City's power to require certain properties to be designated solely for rental housing for low- and moderate-income residents, television and movie studios, stadiums, or a regional shopping mall. A property owner's options would be (i) to leave the land fallow and exclude all others from it, (ii) to use the property for a similar use subject to the approval of any necessary modification or (iii) to sell the property to another to be used as authorized or with modifications, but for the same use. This developer had the exact same options. It is also clear from the record that all three of the above options provided an economically viable use for the subject site and that use was well within the property owner's investment-backed expectations. *Ehrlich, supra,* 12 Cal.4th at pp. 860-861, 882; Petition Appendix A, pp. A4-A5, A39.

The foregoing authority is even more applicable in this case because a General Plan amendment was

required. As stated previously, under long-standing California law, in order for the subject townhome project to be approved, Culver City had to approve a subdivision map. Cal. Government Code Section 66426. Culver City could not approve that map unless it could also find that the proposed project was consistent with the city's General Plan. Cal. Government Code Section 66474. To be able to make that required finding, Culver City had to amend its General Plan so that the land use designation for the subject property could be changed from commercial to residential. The importance of the General Plan in California has been clearly stated by the California Supreme Court. The General Plan is the "constitution" or "charter" for future development in California cities. *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531 (1990). Pursuant to the foregoing, Culver City could not approve the townhome project without a General Plan amendment.

It is also important to note that the commercial land use designation was the result of a 1974 request from the petitioner to change the designation so that the recreational facilities could be built. Under that commercial designation, Culver City could have permitted many different non-residential uses on the site, including recreational uses. In determining whether land-use regulations effect a compensable taking, the owner's reasonable investment-backed expectations are to be taken into account. *Penn Central Transp. Co., supra*, at p. 124. In this case, the petitioner sought and the city has approved an "upzoning" of his property beyond the petitioner's reasonable investment-backed expectation in 1974 to have his property designated for recreational uses. Also, even

a regulation which deprives an owner of all economic use of his property will not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 2899 (1992). Under the instant facts, neither test would have been violated had Culver City refused to approve the General Plan amendment necessary for the townhome development. The recreational use was originally requested by the petitioner. Petition at p. 4. That recreational land use was made applicable to the property before the petitioner became the owner. Petition at p. 5. Based upon the foregoing law and facts, Culver City was under no obligation to modify its General Plan to permit the residential project.

In addition, providing for recreational facilities through conditions for dedication of land or payment of fees has been upheld as a valid governmental exaction. Even the majority of lower court decisions cited in *Dolan* in support of the "rough proportionality" rule validate the exercise of governmental authority to provide those public benefits. *Jordan v. Menomonee Falls*, 28 Wis.2d 608 (1965); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979); and *Collis v. Bloomington*, 310 Minn. 5 (1976).

Based on the foregoing, Culver City had authority to regulate land within its jurisdiction in order to provide for recreational uses. Under that authority, it could have refused to change the commercial recreational land use designation on the site or, as it did in this case, required the payment of a fee to reduce the impacts which would result from that change in use. With that legitimate and in

this case compelling state interest established, the next inquiry is whether the recreation fee and that state interest have an "essential nexus".

There is no doubt such a connection exists. The sole purpose of the recreation fee is to provide for recreational facilities. In the findings made to support the imposition of the recreation fee, Culver City expressly determined the fee would be used for replacement of community recreational facilities which were provided by previous land use restrictions applicable to the site. Petition Appendix M, p. M5; *Ehrlich, supra,* at p. 862; Petition Appendix A, p. A6. Therefore, the recreation fee serves the same legitimate interest served by Culver City's regulation of land uses, that is, to provide an opportunity for the creation of community recreational facilities. Based upon the foregoing, the *Nollan* "essential nexus" requirement has been met.

The petitioner states that if the mitigation fee is permitted to stand, then cities may require payments for removal of grocery stores, lawyers' offices and saloons. Petition at p. 20. This contention is no more than unfettered and unsupported hyperbole.

Any city would be hard pressed to be able to show, through satisfactory evidence, that loss of one grocery store, lawyer's office or saloon could cause a significant impact on the community. When so many other similar establishments would likely be readily available, it would be virtually impossible to require some special mitigation.

Unlike those uses, recreational facilities have been recognized to serve legitimate public interests and benefits, which can be served through development conditions. Based on the foregoing, this reason for granting review is clearly spurious.

III.

THE ART PROGRAM IS NOT A *PER SE* PHYSICAL TAKING OF PRIVATE PROPERTY

A physical taking occurs only when a governmental agency physically occupies private property.

> Because the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a per se taking under *Loretto*.

Yee v. City of Escondido, supra, at p. 539. Prior to that holding, this Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982):

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad authority to impose appropriate restrictions upon an owner's *use* of his property. [Emphasis original.]

As stated earlier, pursuant to Culver City's art program a developer may place art work on a subject project

site and retain all ownership interest in that art work and the site. No publicly owned art work would be placed on the developer's property nor is any property given to the city. Alternatively, the developer may pay an in lieu fee. If that fee is paid, then no art work, either private or public, is placed on the developer's property. As discussed below, the program is more akin to aesthetic use regulations which require certain types of architectural design. Based on the foregoing, it is clear that no physical occupation of private property is required or even implicated by the art program.

IV.

NO HEIGHTENED SCRUTINY NEED BE APPLIED TO CULVER CITY'S ART PROGRAM

Culver City's art program requires neither a dedication of land or other property, nor the payment of any fees. Instead, it provides the owner of a large development with at least two options.[7] An art work can be incorporated into the development project or an in lieu fee can be paid to the city which is deposited into a special fund for the purchase of art work. In the first instance, the developer retains all right, title and interest in the art work. In the latter, Culver City could use the money to purchase art work to be placed on public property. The choice is left to the absolute discretion of the developer. The art requirement was adopted by ordinance through a legislative process and applies throughout the

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[7] The program exempts small developers and developers of affordable or senior housing projects.

city. Petition Appendix N, pp. N1-N12. The city made specific findings regarding the purpose of and reasons for the art program. Petition Appendix N, pp. N1-N2. The requirement is similar to other development conditions related to aesthetics, such as setbacks, open space, landscaping, color schemes, materials used and architectural design, all of which are valid exercises of a city's police power. The art program does not require the developer to give anything to the city.

Nothing in *Nollan* or *Dolan* indicates this Court intended to limit a city's police power as it relates to aesthetic regulations. The art program is merely a logical extension of the city's authority to regulate in the area of aesthetics. In numerous cases, this Honorable Court has stated that the police power extends to community aesthetics. *Penn Central Transp. Co., supra* (requirement to preserve landmark structures); *Agins, supra* (condition requiring scenic views); *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (prohibition against posting signs in the public right of way). The city's art program is no more an exaction than are typical requirements for developers to incorporate into their developments certain architectural and design elements. As noted by the California Supreme Court, such development conditions are clearly within the City's police power. *Ehrlich, supra,* at pp. 885-886. Based upon the foregoing, Culver City's art program does not constitute an exaction subject to review under the *Nollan/Dolan* standards.

> "We accept beauty as a proper community objective, attainable through use of the police power." [Citation.] [¶] Present day city planning would be virtually impossible under a doctrine

> which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life.

Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 861-862 (1980) (footnote omitted).[8]

If this Court embraces the petitioner's bold assertions that the art program must and cannot meet the *Nollan* and *Dolan* tests, then no city could require general landscaping, architectural amenities or other aesthetic related requirements as conditions of development. Under the petitioner's theory, unless Culver City could deny a requested permit because of its direct impact on landscaping, architecture or aesthetics in the city, it could not attach landscaping, and other design criteria as conditions of approval for a development. Such an absurd result is obviously not what this Court had in mind when it decided *Nollan* and *Dolan*. In fact, such a conclusion would be contrary to this Court's direction relating to a city's authority regarding aesthetics. As noted previously, this Court has stated time and again community aesthetics are concerns to which a city's police power

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[8] Although this ruling was reversed on other grounds in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the majority applauded the California Supreme Court's holding that the police power extends to aesthetic regulation, pointing out that this had placed California law "in accord with that of most other jurisdictions." *Id.* at p. 508 fn. 13; *see*, also *Id.* at pp. 530, 541 and 557 (agreement by concurring and dissenting opinions).

extends. The petitioner should not be permitted to uproot the long-standing holdings of this Honorable Court – holdings which have concluded that a substantial police power goal is promoted when a city regulates in order to advance aesthetic interests.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the petition.

Respectfully submitted,

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